Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

NEW PROCESS STEEL, LP, PETITIONER

v.

JOSEPH YOUNG, DARREL SIMS,
MARK STEVEN GREER, MORRIS PICKETT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision of the Eleventh Circuit conflicts with the clear language and legislative intent of Rule 7 of the Federal Rules of Appellate Procedure by requiring that the district court engage in a *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978) (hereafter referred to as "*Christiansburg*") analysis before an appeal is filed and before attorneys' fees are included in a cost bond.

2. Whether the standard applied by district courts in **formulating an amount** for a bond under Rule 7 of the Federal Rules of Appellate Procedure should be the same standard as that used when deciding **whether to award** attorney's fees to a prevailing defendant in a Title VII action under the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000e-5(k)).

3. Whether the decision of the Eleventh Circuit violates a prevailing defendant's rights to due process and is contrary to Supreme Court precedent for the Court to require a district court to analyze the not-yet-filed appeal using the requirements set forth in *Christiansburg* before attorney's fees are included in the amount set for a bond under Rule 7 of the Federal Rules of Appellate Procedure.

4. Whether the decision of the Eleventh Circuit creates an impossibility, thus depriving the prevailing defendant of its rights to due process. Moreover, the Court of Appeal's failure to require the losing plaintiff to identify at least one meritorious point of appeal makes it impossible for the district court to make the necessary findings to include attorneys' fees in a bond order

pursuant to Rule 7 of the Federal Rules of Appellate Procedure.

5. Whether the decision of the Court of Appeals eliminates judicial economy and creates a regime whereby Civil Rights cases will require multiple appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner New Process Steel, L.P. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App. 1a) is reported at 419 F.3d 1201 (11th Cir. 2005). The original opinion of the United States Court of Appeals for the Eleventh Circuit was withdrawn but is reprinted for the Court's convenience at App. 17a. The order denying the petition for rehearing en banc (App. 25a) is reported at __ F.3d ___ (Table No. 04-22554)(11th Cir. 2005). The Memorandum Opinion of the United States District Court for the Northern District of Alabama, dated March 15, 2004 is unpublished and is reprinted as Appendix 23a to this Petition.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Eleventh Circuit dated August 9, 2005, pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit denied the petition for rehearing *en banc* on September 30, 2005. The district court had jurisdiction of this case pursuant to 42 U.S.C. section 1981 and 42 U.S.C. section 2000e (Title VII).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. XIV, § 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) (2004):

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

42 U.S.C. §1988(b):

> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ...."

Rule 7 of the Federal Rules of Appellate Procedure:

> "In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal."

STATEMENT

At various times, Congress has enacted legislation that deviates from the "American Rule." This fee shifting has the effect of encouraging certain conduct and discouraging other behavior. Additionally, Congress has also, from time to time, deliberately included attorneys' fees in the statutory definition of "costs." However, there is a significant distinction between an award of "costs" including attorneys' fees, which essentially transfers wealth from one party to another and the posting of a bond, including attorneys' fees, which merely provides security in the event attorneys' fees are awarded at the conclusion of the litigation. This case presents the question of whether the district court should be required to conduct the same analysis of anticipated appellate points in order to set the bond as it does in order to award a defendant its attorneys' fees at the conclusion of the trial on the merits.

After successfully defending the Respondents' claims that New Process was a racially hostile work environment, New Process was granted judgment in its favor on October 23, 2003 and awarded costs incurred during trial in the amount of $50,055.51. The trial court then granted New Process's Motion pursuant to Rule 7 of the Federal Rules of Appellate Procedure and set a

cost bond in the amount of $61,000.00 of which $60,000.00 constituted **unrefuted** attorneys' fees on appeal. The trial court correctly noted in its Memorandum Opinion that *Pedraza v. United Guar. Corp.*, 313 F.3d 1323 (11th Cir. 2002) did "not require the court to predict whether or not a defendant will prevail on appeal, or to require that defendant demonstrate that the appeal is frivolous." *Memorandum Opinion*, App. 23a. To require such a finding "would be presumptuous and would be injudicious without reading appellant's brief." *Garrett v. University of Alabama*, 359 F.Supp.2d 1200, 1203 (N.D. Ala. 2005)

Respondents appealed to the Eleventh Circuit Court of Appeals arguing that *Pedraza* should be ignored and, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) expanded to require the district court to analyze the merits of the appeal using the same standard as a trial court does when awarding attorneys' fees to a successful defendant. Under the Respondents' theory, this analysis would occur, not at the conclusion of the appeal, but when the bond is **set**, after the notice of appeal is filed, and before the points of appeal are articulated and briefed.

The Court of Appeals struggled with this issue, rendering its first opinion on November 23, 2004, then withdrawing it and issuing a new opinion August 9, 2005. In its original opinion, the Court of Appeals made two significant, and erroneous points. First, it held that the "definition of costs included a prevailing defendant's attorneys' fees only if the plaintiff's action was 'frivolous, unreasonable, or without foundation.'" November 23, 2004 Opinion, App. 21a (emphasis added). Secondly, it also held that it was New Process's burden

to "prov[e] that YSG&P's appeal meets the *Christiansburg/Baker* standard." *Id.* at App. 22a. This holding created an impossibility as the Court did not obligate the plaintiffs to articulate any points of appeal.

Upon reconsideration, the Court of Appeals modified its position. However, the impossibility still existed with the Court's second opinion. Indeed, the Court now asserts that it was not obligated to follow its holding in *Pedraza* and could essentially change its position with respect to what constitutes "costs" under Title VII and the analysis that must be followed to order a bond, which includes attorneys' fees.

The Court of Appeals, ignored the plain language of Rule 7 and impermissibly expanded *Christiansburg* by holding that the district court is required to conduct a *Christiansburg* analysis **prior** to including attorneys' fees in the bond permitted under Rule 7. Additionally, the Court failed to require the losing plaintiff to bring forth even one point of appeal for consideration by the district court. This clearly imposes an impossible burden on a district court to analyze the merits of anticipated appellate points well before the brief in support of the appeal is even filed.

A number of other courts have struggled with the interplay between Rule 29, Rule 7, 28 U.S.C. section 1927 and the various fee-shifting statutes. While some courts recognize that Congress intended, under certain circumstances, to subsume attorneys' fees within the definition of "costs", others have not. The decisions are inconsistent among the Circuits. The Eleventh Circuit has taken the inconsistency one step further by now imposing an additional hurdle for a